TEKNO KOTA SDN BHD

v.

SETAPAK HEIGHTS DEVELOPMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[SUIT NO: S22-225-1999]
11 JUNE 2003

CONTRACT: *Sale and purchase of land - Deposit, forfeiture of - Whether it was agreed by parties that deposit be forfeited - Whether deposit was forfeited when contract was frustrated - Whether contract was frustrated or terminated - Whether contract provided for circumstances when deposit was to be forfeited and when refunded - Whether contract not performed due to matters beyond control of parties - Whether cancellation of loan to finance purchase of land fell within matters beyond control of parties*

The plaintiff claimed for refund of the deposit paid under an agreement for the sale and purchase of a piece of land ('SPA'). The SPA was said to be frustrated due to matters outside its control as the loan that was offered by a lending bank to finance the purchase of the said land was cancelled due to the central bank's (Bank Negara's) direction to banks to reduce loans to the property sector.

The defendant argued that the SPA was not conditional upon the plaintiff obtaining financial assistance from a financial institution. As such, pursuant to cl. 5(a) SPA, the defendant was entitled to forfeit the deposit paid. The plaintiff relied on cl. 5(b) SPA that the deposit should be refunded due to reasons beyond its control.

Held:

[1] Considerable weight is to be given to the label attached to the first payment. If it is a deposit, it is forfeitable. If it is part payment it is refundable. A deposit can also be a part payment in which case it will ordinarily be forfeitable. The reasonableness stipulated as a deposit is one of the significant factors to determine whether it is a true deposit. The figure of 10% in this case was generally accepted as a reasonable amount for a deposit. It is also up to the parties when a deposit is to be paid. A deposit need not necessarily have to be paid at the time of the signing of the agreement. (p 365 c)

[2] Clause 5 SPA was a specific provision for the particular circumstances when the deposit was forfeitable and when it was refundable. The specific provision made by the parties in the SPA must override resorts to inferences as to the intention of the parties in cases where no specific provision is made. Unless it is illegal, or otherwise null and void, the agreement of the parties must prevail. (p 365 f-g)

[3] Clause 5 SPA referred to the event where the transaction could not be completed due to reasons beyond the control of the parties. Its term was similar to the doctrine of the frustration of contracts. However, it was a grave error to overlook the fact that cl. 5 was a term of the agreement between the parties who had foreseen and chosen to provide specifically for the eventuality and therefore had nothing to do with the doctrine of frustration of contracts as understood generally. Further, the parties did not have in their minds that the SPA had become frustrated but had been terminated by them. The defendant itself had asserted that it was agreed in a meeting held between the parties to terminate the SPA whilst the plaintiff admitted that the parties had agreed to terminate the agreement but that the deposit was to be forfeited. It was plain that the parties had at all times acted upon the basis there was a termination of the SPA and that cl. 5 thereof was to be applied. (pp 368 h & 369 a-d)

[4] The direction of Bank Negara to banks was beyond the control of both the plaintiff and the defendant. Clause 5(a) SPA provided that the vendor shall be entitled to forfeit the deposit in the event the purchaser failed to complete the SPA for any reasons whatsoever "other than those beyond the control of the purchaser". The inability of the plaintiff to complete the purchase fell within "other than those beyond the control of the purchaser". As such, the operation of cl. 5(a) was excluded. It therefore met with that part of the requirement of cl. 5(b) SPA where it was to be refunded for "reasons beyond the control of the parties …". Clause 5(b) did not exclude the inability to obtain a loan from that requirement. (p 373 b-e)

[Judgment in favour of plaintiff.]

Case(s) referred to:
Blackburn Bobbin Co v. Allen & Sons [1918] 2 KB 467 ***(refd)***
Highceed Corp Sdn Bhd v. Warisan Harta Sabah Sdn Bhd & Anor [2000] 5 MLJ 337 ***(refd)***
Khung Swee Heng & Anor v. Paritam Kaur [1948] MLJ 170 ***(refd)***
Linggi Plantations Ltd v. Jagatheesan [1972] 1 MLJ 89 ***(refd)***
Mahalingaswami Devasathanam v. Sambanda Mudaliar AIR [1962] Madras 122 ***(refd)***
Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd & Anor [2001] 7 CLJ 48 HC ***(refd)***
Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1979, s. 103
Contracts Act 1950, s. 57(2)

For the plaintiff - K Kirubakaran (S Malar); M/s Kiru & Yong
For the defendants - Sri Kumar (Mohana Krishnan); M/s Sri Ram & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

The Background Facts

The background facts and chronology are as follows.

Setapak Heights Development Sdn. Bhd. (the defendant) was at all material times the registered proprietor of a piece of land held under Grant No. 10101, Lot No. 14271, Setapak, Kuala Lumpur measuring approximately 283,026 square metres.

Pursuant to a sale and purchase agreement dated 23 August 1995 (SPA) between the defendant and Tekno Kota Sdn. Bhd. (the plaintiff), the defendant agreed to sell and the plaintiff agreed to purchase the said land for a total consideration of RM54,500,000 calculated at a rate of RM93 per square foot. The purchase is conditional upon fulfillment of the Conditions at cl. 3 of the SPA as follows:

CONDITIONS PRECEDENT

(a) This Agreement is conditional upon:

(i) The Vendor furnishing to the Purchaser the relevant authorities' approval for the Layout Plan (hereinafter referred to as "the Layout Plan Approval").

(ii) The Vendor furnishing to the Purchaser proof of submission by the Vendor of the application for the Development Order to the relevant authorities.

(iii) The Purchaser receiving from the Foreign Investment Committee of the Prime Minister's Department their approval in respect of the acquisition of the said Parcels by the Purchaser (hereinafter referred to as "the FIC Approval").

(b) The time period for compliance with the Conditions set out in Clause 3(a) hereinabove shall be six (6) months from the date of this Agreement or such extended period of time as shall be mutually agreed upon by the parties hereto, failing which this Agreement shall be no further effect.

(c) The parties hereto hereby undertake that they shall, in so far as it may be required, provide such assistance as the other may require to secure the fulfillment of the relevant Conditions set out in Clause 3(a) hereinabove and in this regard, the Vendor shall if and when requested in writing by the Purchaser or the Purchaser's Solicitors within fourteen (14) days of such request provide all the necessary information relating to the Vendor and the said Land or Parcels and sign all documents relating to and necessary for the Purchaser's application to the Foreign Investment Committee.

(d) In the event the FIC Approval is granted subject to any term or condition, the Purchaser shall not be entitled to object to any such term or condition but shall accept and comply with such term or condition of the FIC Approval and the FIC Approval shall be deemed to have been obtained.

(e) There shall be no obligation to appeal against the rejection of an application for the Approval.

(f) In the event:

i) the application for the FIC Approval required pursuant to Clause 3(a)(iii) is rejected; or

ii) the FIC Approval granted is subject to any condition which the affected party objects to in accordance with the provisions of Clause 3(d) the Purchaser may at its absolute discretion assign or nominate a nominee to fulfill this Agreement, whereupon the condition referred hereto shall be similarly deemed to have been obtained.

The plaintiff paid to the defendant a sum of RM5,450,000 as deposit under the SPA on 13 March 1996.

The plaintiff failed to pay the balance purchase price.

The SPA had lapsed pursuant to cl. 3(b) on 22 February 1996.

The plaintiff was offered a term loan and a bridging loan facility of RM60 million by Arab-Malaysia Bank Berhad (AMBB) by AMBB's letter dated 11 April 1996.

The defendant obtained a Layout Plan Approval after the SPA had lapsed but before 23 August 1996.

A Supplemental Sales and Purchase Agreement (SSPA) was entered into on 23 August 1996 to revive and vary the terms of the SPA. The SSPA made provision for:

(a) Mode of payment of balance of purchase price and a new completion date being 10 weeks from the receipt by the purchaser's solicitors of:

  i) Vendor's solicitor's confirmation that separate original issue documents of title of the parcel purchased, free of encumbrances, are deposited with the vendor's solicitors;

  ii) photocopy of each of the separate issue documents of title, current quit rent and assessment receipts in respect of the said parcels purchased; and

  iii) Original Memorandum of Transfer in respect of the parcels together with the relevant stamping proforma duly executed by the vendor in favour of the purchaser.

(b) Release of final balance.

(c) Memorandum and transfer and issue of separate documents of title.

(d) Saving provision for the original SPA.

(e) Deletion of conditions precedent in cl. 3(a)(ii) of SPA.

(f) Defendant as vendor to assist the plaintiff as purchaser in submitting any application, documents or plans to the relevant authorities, including Development Order, building plan approval etc.

Pursuant to the SSPA, the plaintiff was also required to pay a sum of RM500,000 as a lump sum interest at the same time on the completion date.

On 16 December 1997 Bank Negara issued guidelines to lending to the property sector, citing package of measures to restore macro-economic stability, and policy stance on bank credit to the property sector.

At a meeting between the plaintiff and the defendant held sometime on or around 21 January 1998, the plaintiff informed the defendant of its inability to complete the purchase of the said commercial parcel and had also informed the defendant that the said inability to pay was beyond the plaintiff's control.

The defendant issued a letter on 5 February 1998 as follows:

> We refer to the lunch meeting on 21st January, 1998 between your good self, Tan Sri Dato' Low Keng Huat and the undersigned.
>
> We write to confirm that during the meeting, you confirmed that you are unable to complete the Sale and Purchase Agreement dated 23rd August, 1995 ("the SPA") and the Supplemental Sale and Purchase Agreement dated 23rd August 1996 ("the Supplemental SPA") and accordingly, the SPA and the Supplemental SPA are terminated pursuant to Clause 5 of the SPA.

The defendant sent a reminder dated 21 April 1998, redirected to new address of plaintiff, and received on 12 May 1998.

The plaintiff's reply dated 19 May 1998 asserted that:

(a) Whilst plaintiff agreed at the meeting of 21 January 1998 that SPA and SSPA be terminated, they were still willing to perform the agreement, but their ability to complete the purchase was contingent upon their securing finance to pay for the balance of the purchase price.

(b) The completion of SPA and SSPA was contingent on certain pre-conditions that were not met yet.

(c) The parties had agreed in 21 January 1998 meeting that due to the fact that the economic situation had affected the ability of the parties to fulfill the agreement, referring to the liquidity crunch and the tightening of the financing market as predicaments beyond the control of the parties and likely to continue for an extended period and putting into question the ability of the parties to fulfill the agreements; and

(d) The deposit in the circumstances ought to have been rightly refunded but offered as a gesture of goodwill to accept a 50% refund of RM2,725,000.

The defendant's reply of 27 May 1998 put forward a different understanding of the meeting of 21 January 1998. It asserted a different understanding of the meeting:

(a) That due to the change in financial circumstances, the plaintiff was unable to complete the purchase;

(b) That being so, the defendant would cease to pursue to fulfill their part of the agreements; and in view of the aforesaid,

(c) The agreements are terminated and the deposit is forfeited.

AMBB served notice *vide* letter dated 7 August 1998 on the plaintiff terminating their loan offer, citing tightening liquidity situation in the local money market.

By a letter dated 19 September 1998, the plaintiff demanded from the defendant a refund of the said deposit sum of RM5,450,000.

The defendant failed and/or neglected to refund the deposit.

The plaintiff filed a writ of summons on 5 April 1999 to seek:

(i) Judgment for refund of the deposit of RM5,450,000;

(ii) Interest;

(iii) Costs; and

(iv) Such other or further relief as the court deems fit.

The Dispute

The defendant argues that the SPA is not conditional upon the plaintiff obtaining financial assistance from a financial institution to assist the plaintiff in completing the purchase of the said parcels.

The defendant further asserts that at all material times the defendant was willing and able to complete the sale of the said parcels.

The defendant relies upon cl. 5(a) of the SPA gives the defendant the right to forfeit the deposit sum of RM5,450,000 in the event the plaintiff fails or neglects to complete the purchase of the said parcels. The plaintiff relies upon cl. 5(b) that the deposit be refunded, with interests thereon pursuant to cl. 5(b).

The Issues

The parties formulated and submitted a set of 3 questions. I have changed the order of the questions as follows:

(a) Whether the SPA and the SSPA was terminated by a mutual agreement between the parties thereto following the meeting held on or about 21 January 1998.

(b) Whether there was non-fulfillment of any condition precedent on the part of the defendant prior to termination of the SPA and the SSPA.

(c) Is the plaintiff entitled to rely on cl. 5(b) of the SPA and obtain a refund of the deposit that had been paid.

The First Question

The question can be made more precise in this manner: (a) Whether there was an agreement to terminate, and (b) Whether there was an agreement at the same time that the deposit be forfeited.

Whether There Was An Agreement To Terminate

Whether or not the SPA and the SSPA were terminated is a question of fact.

The plaintiff had pleaded in its statement of claim that it was agreed in a meeting on 21 January 1998 that the SPA and the SSPA be terminated.

In its defence the defendant pleaded that on 21 January 1998 the plaintiff told the defendant that it was unable to complete the purchase:

> 14. ... By a letter dated 5th February 1998 (hereinafter referred to as "the said letter"), the Defendant wrote to confirm with the Plaintiff that the Plaintiff was unable to complete the Sale and Purchase Agreement and the Supplemental Agreement as transpired in the said meeting. Accordingly, the Defendant terminated the Sale and Purchase Agreement and the Supplemental Agreement pursuant to Clause 5 of the Sale and Purchase Agreement. The Defendant will rely on the said letter effectively during the hearing/trial of this suit.

That pleading suggests that the termination was made subsequent to the meeting, and not during the meeting. On the other hand the letter of 5 February 1998, and set out earlier above, suggests otherwise. The defendant in that letter sought to have the "confirmation as correct" the understanding that at a meeting of 21 January 1998, the plaintiff confirmed it was unable to proceed with the transaction "and accordingly, the SPA and the Supplemental SPA are terminated pursuant to cl. 5 of the SPA".

The defendant's letter, in my view proves that on a balance of probabilities there was an agreement to terminate the SPA and the SSPA at the time of the meeting on 21 January 1998. I hold, therefore, that the parties on 21 January 1998 terminated both the SPA and the SSPA.

Whether There Was An Agreement At The Same Time That The Deposit Be Forfeited

But there is disagreement now between the parties as to the consequences of the termination. The plaintiff asserted in this action that the deposit should rightly be refunded. The defendant asserted that it was agreed that the deposit was to be forfeited.

The defendant's defence is two fold: (a) it was agreed that the deposit would be forfeited to the defendant; and (b) the deposit is forfeited when the contract was frustrated.

Firstly the issue of whether there was an agreement to forfeit the deposit.

When an agreement is terminated, the consequences following the termination must ordinarily be as provided by the agreement if it has made specific provision. If terms of termination other than that which is provided by the agreement is asserted, that is tantamount to asserting that the agreement has to that extent been amended. It follows that the onus is upon the party so asserting to prove upon a balance of probabilities that there was such an amending agreement.

The defendant asserted there was an agreement made in the meeting of 21 January 1998 that the deposit be forfeited to the defendant. In support of this assertion the defendant relied upon the letter sent by the defendant to the plaintiff dated 5 February 1998.

But said defendant's letter of 5 February 1998, the contents of which has been reproduced earlier above, simply sought to obtain confirmation of the plaintiff that the parties agreed to terminate the agreements pursuant to "cl. 5" of the SPA. It does not mention that there was agreement to forfeit the deposit to the defendant.

Since the letter of 5 February 1998 did not state whether it is pursuant to cl. 5(a) or cl. 5(b), which is at the heart of the dispute between the parties, the questions whether that letter was received or not, or when the letter was received does not matter.

When the defendant issued the reminder on 21 April 1998 to the plaintiff, suggesting that if the plaintiff did not reply, it would be deemed to have confirmed the letter of 5 February 1998. The reminder did not introduce any deviation from the terms of the defendant's letter of 5 February 1998.

The reminder of 21 April 1998 was sent to No. 2, Jalan 52/10, 46200 Petaling Jaya. It was redirected to the defendant at 4th Floor, Wisma Domain, No 18A, Jalan 51A/223, 46100 Petaling Jaya. It was stamped as received on 12 May 1998. A letter was issued by the plaintiff dated 19/5/1998 with the address No. 216, Jalan Pudu, 55100 Kuala Lumpur. The changes of address support the plaintiff's explanation for its delayed response to the letter of 5 February 1998.

Be that as it may, even if the plaintiff confirmed or is deemed to have confirmed the letter of 5 February 1998, it would not resolve this dispute or make matters any simpler because there are two parts to cl. 5 – cl. 5(a) allows forfeiture to the defendant and cl. 5(b) for refund to the plaintiff.

The plaintiff's letter of 19 May 1998 asserted the plaintiff's understanding that the deposit would be refundable on the grounds that the agreements could not be completed because the economic situation, liquidity crunch and tightening of the financing market, being circumstances outside of the control of the parties. Although it did not mention cl. 5(b) specifically, the understanding asserted that the deposit was refundable makes it obvious that the plaintiff was relying on cl. 5(b) of the SPA.

Only then did the defendant, by its letter of 27 May 1998, categorically assert it was the defendant's understanding that the deposit would be forfeited to the defendant.

Now, if there had been specific agreement on 21 January 1998 that the deposit would be forfeited to the defendant, there is no reason for the defendant's letters of 5 February 1998 and 21 April 1998 not to be specific on the issue. Furthermore, the fact that the defendant's letter of 5 February 1998 sought to confirm termination only in the general term of "pursuant to cl. 5", and how the deposit is to be dealt with is already specifically addressed in the SPA, suggests that it is more probable that the parties did not make any specific agreement on the issue on 21 January 1998.

I conclude, therefore, in considering the probabilities of the conflicting versions that the evidence relied upon by the defendant does not support its version.

On the other hand, the plaintiff's version was set out categorically in its letter of 19 May 1998 in reply to the defendant's equivocal or unspecific letters of 5 February 1998 and 21 April 1998. This was maintained at all times consistently. I therefore find the plaintiff's version to be the more probable of the two versions.

Even assuming that the consistency of the plaintiff's version alone is insufficient to support the plaintiff's version, the balance of probabilities lie in favour of the plaintiff, leading to the conclusion therefore that the parties did agree on 21 January 1998 that the deposit would be refunded to the plaintiff.

Alternatively, assuming no such specific agreement was made at the meeting of 21 January 1998 as to the disposal of the deposit, it was submitted for the defendant that, relying on *Linggi Plantations Ltd. v. Jagatheesan* [1972] 1 MLJ 89 PC; *Morello Sdn. Bhd. v. Jaques (International) Sdn. Bhd.* [1995] 2 CLJ 23 FC, that a deposit is a genuine pre-estimate of the damages and for that reason is forfeitable.

It is clear considerable weight is to be given to the label attached to the first payment. If it is a deposit, it is forfeitable. If it is a part payment it is refundable. A deposit can be a part payment also, in which case it will ordinarily be forfeitable. The reasonableness of the sum stipulated as a deposit is one of the significant factors to determine whether it is a true deposit. The figure of 10% as in this case is generally accepted as a reasonable amount for a deposit. It is also up to the parties to agree when a deposit is to be paid. A deposit need not necessarily have to be paid at the time of the signing of the agreement. In *Morello Sdn. Bhd. v. Jaques (International) Sdn Bhd.* the seller was not precluded from recovering the unpaid deposit notwithstanding that the agreement did not provide for the forfeiture of the deposit.

But non-performance is not necessarily the fault of the party that did not perform. That party may not have performed because it (a) did not want to perform or (b) could not perform by reason of (i) its own fault; (ii) the fault of the other party or (iii) other reasons beyond his control or the control of the parties. For this reason it is not at all unusual for more specific provision to be made in an agreement to take into account the element of blameworthiness. Clause 5 appears to be such a provision, providing in (a) where it may be forfeited, and (b) when it must be refunded.

The SPA as revived by the SSPA provides in cl. 5 a specific provision for the particular circumstances when the deposit in this case is forfeitable and when it is refundable. The specific provision made by the parties in the SPA must override resort to inferences as to the intention of the parties in cases where no specific provision is made. Unless it is illegal, or otherwise null and void, the agreement of the parties must prevail.

Second Issue

The completion of the SPA and SSPA by payment by the plaintiff to the defendant's solicitors as stakeholders need to be performed by the plaintiff only when the defendant's solicitors give to the plaintiff: (a) written confirmation that the original separate Issue Documents of Title free of encumbrances have been deposited with them; (b) photocopies of the separate Issue Documents of Title; and (c) the Original Memorandum of Transfer of the parcels together with the relevant stamping proforma, both duly executed by the defendant in favour of the plaintiff.

Under the SPA the defendant had to furnish to the plaintiff within six months: (a) a Layout Plan Approval, (b) proof of submission of application for Development Order.

When the SSPA was signed on 23 June 1996 by the parties to revive the SPA, it deleted the obligation upon the defendant under cl. 3(a)(ii) of the SPA to show proof that an application for a Development Order had been submitted. It acknowledged that the Layout Plan Approval has been obtained on 12 March 1996.

Mr. Sri Kumar of Sri Ram & Co submitted that the separate issue documents of title to be provided by the defendant are only available after the Development Order has been obtained. He referred to cl. 10 and 11 of the SSPA to say that the duty is upon the plaintiff to secure the Development Order. He submitted the issue is a non-starter and that the defendant cannot be accused of having breached the SPA and SSPA.

Clauses 10 and 11 of the SSPA provide:

> 10. **CONDITION PRECEDENTS TO CEASE TO HAVE EFFECT**
>
> For the avoidance of doubt, the condition precedent stated in Clause 3(a)(ii) of the Principal Sale and Purchase Agreement shall be deemed deleted with immediate effect, without prejudice to the provisions of Clause 11 hereof.
>
> **11. VENDOR TO RENDER ASSISTANCE TO PURCHASER**
>
> The Vendor hereby agrees to render all such assistance, to provide all information and particulars and to execute and do (and to procure all other necessary persons or companies, if any, to execute and do) all such further deeds, assurances, acts and things as may be reasonably required to assist the Purchaser in submitting any application, documents or plans whatsoever to the relevant authorities, including the application for the Development Order and building plan approval, and all such application, documents or plans (if required to be executed or endorsed by the Vendor in connection with the Purchaser's application for approval to the relevant authorities) shall be so executed or endorsed by the Vendor within a period of three (3) days from the Purchaser's written request.

In view of cls. 10 and 11 of the SSPA that the plaintiff should obtain the Development Order, and that there is no time period set down for the defendant to deliver separate issue documents of title, I find there is no reason to say that the defendant has been in breach of any of his obligations.

Third Issue

Mr. Sri Kumar submitted that the pleadings of the plaintiff show that the plaintiff's case relied upon frustration of contract. He submitted that the law with regard to frustration of contracts in Malaysia is governed by s. 57(2) of the Contracts Act 1950 (the Act), which recognizes only two instances of frustration: illegality and impossibility. He then argued that the withdrawal of banking facility that had been secured earlier, conceding the defendant knew that the plaintiff needed such banking facility, does not constitute impossibility within the meaning of s. 57(2). To fortify his argument he submitted that neither the SPA nor the SSPA provided that the availability of a bank loan is a condition precedent, even though the agreement did provide for other events a conditions precedent. In the same vein he submitted there was no evidence that the plaintiff had in this case accepted the loan offered by AMBB or that the plaintiff had sought loans from other banks and failed. He questioned why the public listed 60% shareholder of the plaintiff company could not inject funds into the plaintiff company.

The submission of Mr. K. Kirubakaran may be summarised as follows:

(a) The defendant knew that the plaintiff relied upon availability of a loan facility for the reason that: (a) the SPA provided at (i) Recital 8 stated the plaintiff may be obtaining a loan, and (ii) Clause 4 made provision in case of payment of balance purchase price from a loan facility; (b) the SSPA provided at (i) Clause 2(c)-(f) envisaged release of funds by the purchaser's "Financier"; and (c) that the solicitors of AMBB Bhd. wrote a letter dated 20 August 1996 to the defendant's solicitors of the loan facility that was extended. To his credit, knowledge that the defendant knew that the plaintiff required a loan facility to pay for the purchase is conceded by Mr. Sri Kumar.

(b) That it is not disputed that AMBB did issue a letter dated 23 January 1998 to suspend temporarily the loan that was extended, citing tightening liquidity in the local money market.

(c) The testimony of Che King Tow (PW1) that he was notified orally before AMBB issued its letter of 7 August 1998, and confirmed by Michael Lim Tung Kean (PW2).

(d) PW2 told the court that the action by the bank was because of the guidelines issued by Bank Negara.

(e) It would be an offence under s. 103 of the Banking and Financial Institutions Act 1979 (BAFIA) to breach the Bank Negara guidelines.

(f) The letter of 7 August 1998 cancelled the loan due to tightening liquidity, a condition not denied by the defendant and which was also cited in the Bank Negara guidelines.

(g) The plaintiff did not envisage that a loan offered would be recalled through no fault of the plaintiff.

(h) The plaintiff did not apply to other financial institutions because of the prevailing financial condition.

(i) The tightening of liquidity in the financial market and cancellation of the loan as a result of the Bank Negara guidelines were matters outside of the control of the plaintiff and comes within cl. 5(b) of the SPA.

Section 57 Contracts Act 1950
Section 57 of the Act provides:

(1) An agreement to do an act impossible in itself is void.

(2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Section 57(2) is a general provision of law where a contract cannot be performed because performance of it has become illegal or impossible. That it has become commercially impossible or unprofitable is not sufficient if performance of the contract remains physically and legally possible: see *Blackburn Bobbin Co. v. Allen & Sons* [1918] 2 KB 467.

Frustration Of Contract
If there were no provision made in the agreement between the parties, "frustration of contract" that may be invoked must necessarily be restricted to that provided by the law, ie, the Act. On the other hand there is nothing to prevent the parties to an agreement from agreeing to their own terms or remedy for any eventuality, up to and including an event otherwise within the meaning of s. 57(2) of the Act. There is nothing to prevent any party from contracting out of any of his rights. Where a specific provision is made in an agreement, the parties are bound by the terms of it.

Much of the confusion evaporates when it is recognised that what this case is concerned with is (a) whether there was an agreement made on 21 January 1998 to forfeit the deposit to the defendant, and, failing that, alternatively (b) how is cl. 5 to be applied. Although cl. 5 refers to the event where the transaction cannot be completed "due to reasons beyond the control of the

parties hereto", which term is similar to the doctrine of frustration of contracts, it is, in my view, a grave error to overlook the fact that in this case cl. 5 is a term of the agreement between the parties who had foreseen and chosen to provide specifically for the eventuality and therefore it has nothing to do with the doctrine of frustration of contracts as understood generally.

In this case, the defendant itself asserted that it was agreed on 21 January 1998 in the meeting to terminate the SPA and the SSPA. The plaintiff admitted that the parties agreed to terminate the agreement but stated the deposit should be returned, whereupon the dispute started when the defendant asserted the deposit is to be forfeited. The point is that the parties did not have in their minds that the SPA and SSPA had become frustrated but had been terminated by them. The defendant's action of issuing the letter of 5 February 1998 shows clearly that the defendant itself had in mind the operation of cl. 5, and not the doctrine of frustration generally. The defendant specifically relied upon "cl. 5" in its letter of 5 February 1998 and cl. 5(a) in its statement of defence.

It is plain the parties had at all times acted upon the basis there was a termination and that cl. 5 of the SPA is to be applied.

Loan Facility As Condition Precedent

That a loan facility is recognised in the agreement as necessary to be able to complete the purchase is far from saying that it is a condition precedent. It is nowhere stated in the SPA or SSPA that a loan facility is a condition precedent. I would dismiss this submission by the plaintiff.

Clause 5 Of The Spa

Now, cl. 5 of the SPA provides:

NON-PAYMENT OF BALANCE OF PURCHASE PRICE

(a) In the event the Purchaser shall fail or neglect to comply with Clause 4 hereof or complete the purchase of the said Parcels though the Approvals referred to in Clause 3 above have been obtained and Conditions Precedent have been fulfilled or for any reasons whatsoever other than those beyond the control of the Purchaser or other than through any delay, act of default or omission on the part of the Vendor, then the Vendor shall be entitled to forfeit a sum of Ringgit Five Million Four Hundred Fifty Thousand (RM5,450,000.00) only as liquidated damages. Any sum in excess thereof (if any) shall be refunded to the Purchaser within fourteen (14) days of such termination whereupon this Agreement shall terminate and be of no further effect and thereafter neither party shall have any further claims against the other save for any antecedent breach of this Agreement PROVIDED THAT in the event that such refund is not made within fourteen (14) days of such termination of the

Agreement the Vendor shall be liable to pay to the Purchaser interest at the rate often per cent (10%) per annum on such sum as is to be refunded calculated on a daily basis until actual receipt thereof by the Purchaser.

(b) In the event that this transaction cannot be completed due to reasons beyond the control of the parties hereto all monies paid by the Purchaser to the Vendor shall be refunded to the Purchaser without interest (save and except for the first 10% of the Purchase Price which is to be refunded with accumulated interest earned and thereafter neither party shall have any further claims against the other save for any antecedent breach of this Agreement PROVIDED THAT in the event that such refund is not made within fourteen (14) days of such termination of the Agreement the Vendor shall be liable to pay to the Purchaser interest at the rate of ten per cent (10%) per annum on such sum as is to be refunded calculated on a daily basis until actual receipt thereof by the Purchaser.

Clause 5 of the SPA is revived and saved by the following cls. 6 and 7 of the SSPA:

6. OTHER TERMS AND CONDITIONS NOT AFFECTED

Save and except as herein provided, all the other terms and conditions contained in the Principal Sale and Purchase Agreement shall not be affected or impaired in any way.

Nothing herein contained shall affect or invalidate the Principal Sale and Purchase Agreement which, upon revival, shall continue in full force and effect save and except for the modification herein contained. All clauses and provisions in the Principal Sale and Purchase Agreement where relevant and applicable shall subsist and remain unchanged unless provisions to the contrary are specifically provided for in this Supplemental Sale and Purchase Agreement.

7. WHERE CONFLICT, SUPPLEMENTAL SALE AND PURCHASE AGREEMENT TO PREVAIL

This Agreement shall be read and construed as one with the Principal Sale and Purchase Agreement and where there is conflict or inconsistency between the provisions of the Principal Sale and Purchase Agreement and this Supplemental Sale and Purchase Agreement, the Provisions of this Supplemental Sale and Purchase Agreement shall prevail.

There being no provisions to the contrary, cl. 5 not being in conflict with any provision in the SSPA, and there being no submission that cl. 5 is subject to such defect, I would hold that cl. 5 of the SPA remains in force.

Clause 5 is a contractual provision in its own right, and its application is as such a contractual term within the agreement and is not dependent upon s. 57(2) of the Act as to discharge by frustration. The emphasis in the clause is not only upon the element that a transaction cannot be completed, which would call for consideration whether the impossibility is a commercial impossibility (see *Mahalingaswami Devasathanam v. Sambanda Mudaliar* AIR [1962] Madras 122; *Blackburn Bobbin Co. v. Allen & Sons (supra)* or not only strict impossibility but impracticality because of extreme and unreasonable difficulty, expense, injury or loss involved (see *Khung Swee Heng & Anor v. Paritam Kaur* [1948] MLJ 170), but that there is also a second element that the transaction cannot be completed "due to reasons beyond the control of the parties".

Although cl. 5(b) has the appearance of a 'frustration of contract' provision, cl. 5 as a whole refers to the events envisaged or foreseen by the parties for which they have agreed to and made special provision for. Specifically, they have agreed in cl. 5(b) for the disposal of the deposit paid in the event the transaction cannot be completed due to reasons beyond the control of the parties. Clause 5 is therefore not the occurrence of an event under s. 57(2) of the Act and does not invoke the application of the said Act. It is not necessary therefore at this point to dwell on the cases cited in respect of s. 57(2).

The case of *Highceed Corp Sdn Bhd v. Warisan Harta Sabah Sdn Bhd & Anor* [2000] 5 MLJ 337 is an illustration of the inter-relationship between the doctrine of frustration and contractual terms for similar events. In that case it was held the doctrine of frustration did not apply. Since the building contract did not provide for economic downturn as a reason for the issuance of a stop work order, the court could not infer that the parties to the building contract must have intended to include economic downturn as a factor that could be the basis for the repudiation of the building contract. A consideration of s. 57(2) does not preclude a court from considering whether the agreement makes provision for a similar event, but the court would not infer terms into a contract on the basis of "which the parties must have intended" that could be the basis for repudiation of the contract.

Operation Of Clause 5

The defendant relies upon cl. 5(a) of the SPA. Clause 5(a) provides that "In the event the purchaser shall fail or neglect to comply with cl. 4 hereof or complete the purchase of the said parcels though the approvals referred to in cl. 3 above have been obtained and conditions precedent have been fulfilled or for any reasons whatsoever other than those beyond the control of the purchaser ... then the vendor shall be entitled to forfeit a sum of Ringgit Five Million Four Hundred Fifty Thousand (RM5,450,000) only as liquidated damages ..."

"Other than those beyond the control of the Purchaser"

There is no evidence, nor is it asserted that:

(a) Any of the parties have any control over the offer and continuance of a loan facility from AMBB or any other bank of financial source;

(b) Any of the parties have any control over AMBB or any other bank of financial source whether or not to comply with the guidelines issued by Bank Negara;

(c) Any of the parties have any control over Bank Negara in the issue of its guidelines;

(d) Any of the parties have any control over the circumstances, cited by Bank Negara in its guidelines, of tight liquidity in the banking system requiring measures to restore macroeconomic stability, and causing Bank Negara to act to issue the guidelines.

The existence of a tight liquidity situation in the money or financial market is a notorious fact of 1997 and 1998 of which judicial notice may be taken, and is also evidenced by the consistent assertion of it not only by the plaintiff in its letters of 19 May 1998 and 19 September 1998, but also by the Bank Negara guideline of 16 December 1997 and the letters of AMBB of 23 January 1998 and 7 August 1998. It was acknowledged in *Highceed Com Sdn Bhd v. Warisan Harta Sabah Sdn Bhd & Anor (supra)*.

The plaintiff asserted that by reason of the withdrawal of the loan facility it was unable to proceed with the transaction. It is obvious that ordinarily a loan facility is needed for such a large undertaking. There is no evidence to dispute that assertion, for example by the suggestion that it had other sources or facilities. The mere fact a 60% shareholder is a public listed company, without evidence of the public listed company's available resources, is insufficient since public listing is only indicative of a track record of that shareholder but not necessarily of available resources of the plaintiff company, which has other 40% shareholders, in a purchase as large as in this case.

The guideline as issued by Bank Negara applied to all banks and financial institutions to reduce loans to the property sector. Indeed the direction was very specific, that no credit facilities should be granted where construction has not started, including for the construction of low and medium cost residential properties costing RM150,000 and below (para. 5(i) of Bank Negara Guideline 16 December 1997). Even for property projects where construction had

commenced, viability was to be reassessed, and under strict selectivity to allow for residential properties RM150,000 and below, while others are to be deferred. Banks were to continue to extend credit for the construction and extension of factories and industrial buildings.

Since the inability of the plaintiff to complete the purchase arises from reasons "beyond the control of the purchaser", the operation of cl. 5(a) is excluded. The deposit cannot therefore be forfeited under cl. 5(a).

For the sake of completeness, cl. 5(b) refers to "the event that this transaction cannot be completed due to reasons beyond the control of the parties". Even though the term "parties" is used it is clear that for the purposes of specific application as in this case, and given the wording of cl. 5(a), the operative factor is "beyond the control of the purchaser" rather than "beyond the control of the purchaser and the vendor". Be that as it may, the economic and financial circumstances, the direction of Bank Negara to banks and AMBB itself are beyond the control of both the plaintiff and the defendant, and therefore meets with that part of the requirement of cl. 5(b).

Clause 5(b) does not exclude inability to obtain a loan as being outside the meaning of "reasons beyond the control of the parties ...". The court can only construe the terms of the agreement as contained in the agreement and cannot put in or read into the agreement terms which had not been agreed upon by the parties (see *Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd & Anor* [2001] 7 CLJ 48). It cannot therefore include an exception where the parties have not done so. In any case there is no assertion or evidence that the inability of the plaintiff to obtain a loan in this case arose from any reason limited or peculiar to the plaintiff, such as a bad credit standing. Indeed the evidence before the court is that there is a general economic condition affecting financial conditions so prevalent as merits the Bank Negara to issue a directive on such loans.

I conclude that (a) the plaintiff has discharged the onus that is upon it of proving that there existed circumstances beyond the control of the parties, (b) its inability to perform its obligations in this case arose from these circumstances and (c) that such inability is within the application of cl. 5(b).

The fact the deposit has been paid and disbursed to the defendant by the latter's solicitors is not disputed. No further proof it has been paid is necessary.

Clause 5(b) provides for all monies paid by the purchaser to the vendor to be refunded in the circumstance falling within cl. 5(b). The said clause provides that the sum is to be refunded "without interest save and except for the first 10% of the purchase price, which is to be refunded with accumulated

interest earned" and in the event the refund is not paid within 14 days of the termination, the defendant as vendor is liable to pay to the purchaser interest at the rate of 10% per annum on the sum to be refunded calculated on a daily basis until actual receipt by the plaintiff. The parties having agreed to terminate the SPA and SSPA on 21 January 1998, the interest at 10% operates from 5 February 1998.

For the above reasons judgment was entered as follows:

(a) Judgment entered for the payment of:

(i) RM5,450,000;

(ii) Accumulated interest on RM5,450,000 accumulated from date of payment to date of release of the deposit to the defendant in accordance with cl. 5(b) of the SPA;

(ii) Interest at 10% calculated with daily rests on the amount not paid from 5 February 1998 to date of payment in accordance with cl. 5(b) of the SPA;

(iv) Costs to be taxed or agreed upon *in lieu* thereof.